

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 MARCO RAUL GUZMAN,) NO. CV 08-05971 PA (SS)
12)
12) Petitioner,) ORDER ADOPTING AND MODIFYING
13)
13) v.) FINDINGS, CONCLUSIONS AND
14)
14) DERRAL G. ADAMS, Warden,) RECOMMENDATIONS OF UNITED STATES
15)
15) Respondent.) MAGISTRATE JUDGE
16 _____)

17
18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition,
19 all of the records herein, the Magistrate Judge's Amended Report and
20 Recommendation, and Respondent's Objections. After having made a de
21 novo determination of the portions of the Amended Report and
22 Recommendation to which Objections were directed, the Court concurs with
23 and adopts the findings and conclusions of the Magistrate Judge, except
24 as modified below:

25 \\
26 \\
27 \\
28 \\
\\

1 After the end of the paragraph on Page 7, line 25, the Court
2 inserts the following paragraphs:

3
4 In his March 5, 2009 Objections to the Magistrate Judge's
5 Amended Report and Recommendation ("March Objections"),
6 Respondent argues that "the factual predicate initiating
7 AEDPA's one-year filing period arises when the Board's role in
8 determining an inmate's suitability is complete." (March
9 Objections at 5). Respondent concedes that "the Governor had
10 the constitutional authority to review the Board's decision
11 denying Petitioner parole," but contends that "the
12 determination of a factual predicate does not turn on when
13 Petitioner became certain that the Governor was not going to
14 reverse the Board's decision." (March Objections at 6).
15 Respondent further argues that in Redd, the Ninth Circuit held
16 that "the factual predicate giving rise to a challenge to a
17 Board decision is the completion of the Board's role in the
18 parole proceedings." (March Objections at 4) (citing Redd,
19 343 F.3d at 1083). Contrary to Respondent's argument,
20 however, the Ninth Circuit in Redd actually held that "AEDPA's
21 statute of limitations begins running under § 2244(d)(1)(D) on
22 the date the administrative decision became final." Redd, 343
23 F.3d at 1084 (emphasis added). California law is clear that
24 "[n]o decision of the parole authority of this state with
25 respect to the granting, denial, revocation, or suspension of
26 parole of a person sentenced to an indeterminate term upon
27 conviction of murder shall become effective for a period of 30
28 days, during which the Governor may review the decision."

1 Cal. Const. art. V, § 8(b); see also Cal. Penal Code §
2 3041.2(a). As explained by the California Court of Appeal:

3
4 With respect to parole decisions for prisoners
5 sentenced to indeterminate terms for murder, the
6 Governor possesses ultimate authority to affirm,
7 modify, or reverse the decisions. (Cal. Const.,
8 art. V, § 8.) In order to allow the Governor time
9 to act, no decision granting, denying, revoking, or
10 suspending parole for such a prisoner is final for
11 a period of 30 days. (Ibid.; Pen. Code, § 3041.2.)
12 The 30 day period commences on the effective date
13 of the panel's decision. (In re Arafiles (1992) 6
14 Cal.App.4th 1467, 1474, 8 Cal. Rptr. 2d 492.) As
15 the panel's decision granting parole is not
16 effective for 120 days to allow the board time to
17 act, the Governor's 30-day period does not begin
18 until after that time.

19
20 In re Tokhmanian, 168 Cal. App. 4th 1270, 1273, 86 Cal. Rptr.
21 3d 250 (2008). Thus, the Parole Board's denial of parole did
22 not become "final" until February 3, 2007, thirty days after
23 January 4, 2007, the effective date of the Parole Board's
24 decision. See id. Under Redd, the AEDPA limitations period
25 did not begin to run until the Parole Board's decision became
26 "final." Redd, 343 F.3d at 1084. Accordingly, the AEDPA
27 statute of limitations began to run on February 4, 2007.

1
2 Furthermore, even if the AEDPA limitations period began
3 to run on January 5, 2007, as Respondent contends, (see March
4 Objections at 3), the instant Petition would still be timely
5 because Petitioner is entitled to statutory tolling, as
6 explained below. The limitations period would have run from
7 January 5, 2007 until March 17, 2007 (71 days) and from March
8 13, 2008 until September 7, 2008 (178 days). Accordingly,
9 even if the AEDPA limitations period began on January 5, 2007,
10 Petitioner still had 116 days remaining ($365 - 71 - 178 = 116$)
11 in the limitations period when he filed the instant Petition.
12

13 After the end of the paragraph on Page 10, line 2, the Court
14 inserts the following paragraphs:
15

16 Respondent concedes in his Objections that "the signature
17 page of the petition filed in the Court of Appeal is dated
18 November 12, 2007." (March Objections at 8). Nonetheless,
19 Respondent argues that new evidence shows that Petitioner did
20 not file his habeas petition in the California Court of Appeal
21 until December 3, 2007. (Id.). In support of this argument,
22 Respondent has lodged Petitioner's prison mail log ("Lodgment
23 9") which "shows that Petitioner sent or received something
24 from the court of appeal on December 3, 2007 and December 7,
25 2007, but no activity at all during the month of November,
26 2007." (Id.). The Court finds that this evidence is, at
27 best, inconclusive.
28

1 However, even if Petitioner did not file his habeas
2 petition in the California Court of Appeal until December 3,
3 2007, the Court would still find the resulting 87-day gap to
4 be reasonable under Chavis. In the limited context of life
5 prisoners challenging a parole decision, the California Court
6 of Appeal has held that even a ten-month gap is reasonable.
7 See In re Burdan, 169 Cal. App. 4th 18, 31, 86 Cal. Rptr. 3d
8 549 (2008) ("We do not find a delay of 10 months for an
9 unrepresented prison inmate to file a petition for writ of
10 habeas corpus in the Court of Appeal, after denial of a
11 similar petition in the superior court, to be unreasonable.").
12 Because it is clear that California courts would consider an
13 87-day delay in filing to be a "reasonable time" for life
14 prisoners challenging a parole decision, Petitioner is
15 entitled to gap tolling. See Chavis, 546 U.S. at 198; In re
16 Burdan, 169 Cal. App. 4th at 31.

17 \\
18 \\
19 \\
20 \\
21 \\
22 \\
23 \\
24 \\
25 \\
26 \\
27 \\
28 \\
5

1 Accordingly, IT IS ORDERED THAT:

2
3 1. The Motion to Dismiss is DENIED. Respondent shall file an
4 Answer to the Petition within thirty (30) days of the date of this
5 Order.

6
7 2. The Clerk shall serve copies of this Order by United States
8 mail on Petitioner and on counsel for Respondent.

9
10 Dated: December 11, 2010



PERCY ANDERSON
UNITED STATES DISTRICT JUDGE